

ADJUDICATION REPORTING CENTRE



RESEARCH ANALYSIS OF THE PROGRESS OF ADJUDICATION BASED ON
RETURNED QUESTIONNAIRES FROM ADJUDICATOR NOMINATING
BODIES (ANBs) AND ON QUESTIONNAIRES RETURNED BY
ADJUDICATORS

REPORT No 4
JANUARY 2002

P Kennedy and J L Milligan
School of the Built and Natural Environment
Glasgow Caledonian University
Cowcaddens Road
GLASGOW G4 0BA

ISBN No 1 903661 24 2

INTRODUCTION

This Adjudication Reporting Centre (ARC) report considers two areas; firstly the trends in the number of adjudicators and the number of adjudication referrals and secondly the results of the second survey of adjudicators which provides a detailed insight into the disputes and the adjudication process.

FEEDBACK FROM THE ADJUDICATOR NOMINATING BODIES

Number of Adjudicators

ADJUDICATOR NOMINATING BODY	May 1999	August 1999	February 2000	August 2000	February 2001	April 2001
Academy of Construction Adjudicators	200	219	202	209	182	182
Chartered Institute of Arbitrators	105	105	120	130	147	147
Confederation of Construction Specialists	25	30	25	30	30	32
Construction Industry Council	95	95	83*	138	142	146
Institution of Chemical Engineers	5	5	5	5	Not reported	Not reported
Institution of Civil Engineers	79	79	84	84	84	81
Royal Institute of British Architects	59	61	75	73	71	69
Royal Institution of Chartered Surveyors	72	72	72	94	104	112
3A's Polycron AIMS Ltd	36	36	36	36	36	36
Institution of Mechanical Engineers	8	8	8	2	2	2
Chartered Institute of Building	10	20	46	49	46	46
Construction Confederation	60	60	65	47	40	56
Scottish Building	8	8	11	11	11	11
Royal Incorporation of Architects in Scotland	19	19	21	22	22	22
Royal Institution Chartered Surveyors in Scotland	0	26	27	30	35	35
Centre for Dispute Resolution	Not reported	Not reported	40	40	48	48
Institution of Electrical Engineers	Not reported	Not reported	20	Not reported	Not reported	Not reported
Technology and Construction Solicitors Association	Not reported	Not reported	60	114	117	117
Chartered Institute of Arbiters (Scottish Branch)	Not reported	Not reported	6	12	22	22
The Law Society of Scotland	Not reported	Not reported	6	6	5	6
Technology and Construction Bar Association	Not reported	Not reported	Not reported	Not reported	Not reported	Not reported
TOTALS	781	843	1012	1132	1144	1170

Table 1 – Number of Adjudicators

Skill Base of Adjudicators

DISCIPLINE	No. as at August 2000	No. as at February 2001	No. as at April 2001
Quantity Surveying	458	467	481
Lawyers	227	212	234
Civil engineers	155	213	234
Architects	125	119	132
CIOB/Builders	38	47	45
Project Engineers	19	1	1
Construction Consultants	13	9	6
Structural Engineers	12	18	17
Mechanical Engineers	11	7	13
Specialist Constructors	9	0	0
Building Surveyors	9	10	19
Electrical Engineers	7	3	4
Chemical Engineers	6	1	1
Planners	3	4	4
Projects managers	3	2	4
Materials Testing Specialists	3	3	3
Contracts Consultants	2	0	23
RTPI	2	1	1
Geotechnical Engineers	1	5	7
Independent mediator	0	1	1

Table 2 – Primary discipline of adjudicators (as stated by the ANBs)

The ANBs were invited to state the principal area of expertise of their adjudicators and how many had dual qualifications. The findings show that adjudicators came mainly from the quantity surveying discipline - accounting for 481. This was followed by lawyers and civil engineers with 234 each and architects slightly up on last time with 132.

The number holding dual qualifications is very much the same as the previous report as one might expect. The Construction Industry Council reported that they have 6 adjudicators who are members of both RIBA and RICS which is a less common combination. There were reports of adjudicators who hold membership of more than one professional body, for example one ANB reported that they had adjudicators who were members of both the Institution of Structural Engineers and the Institution of Civil Engineers. Such combinations may be considered complimentary and are at the boundary of what may be regarded as qualifications in two disciplines in comparison to for example, civil engineering and law.

Trends in Adjudication

The number of adjudications has continued to grow since Report No 3 but this growth is starting to level off. Table 3 shows the growth since the start of statutory adjudication in May 1998. These figures represent all ANBs who have reported to the centre. It should be noted that some ANBs started reporting some time after the study commenced a few of the relatively inactive ANBs have stopped reporting and the reporting pattern of some is patchy. The growth rate has reduced considerably from 600% in year 2 to 53% in year 3. These figures are based on raw data and have to be viewed with caution.

TIME PERIODS	ALL ANBs REPORTING	% GROWTH
YEAR 1 - May 1998 - April 1999 (12 months)	187	
YEAR 2 - May 1999 - April 2000 (12 months)	1309	600%
YEAR 3 - May 2000 to April 2001 (12 months)	1999	53%

Table 3 – Adjudications by all reporting ANBs

The figures shown in Table 4 shows the adjudications handled by the same 14 ANBs who have provided the centre with data consistently since the beginning and therefore may represent a more reliable indication of trends. Here, whilst the growth between year 1 and year 2 was lower than the raw figures above at 518% for year 2 and the growth for year 3 was only 42% over year 2. The consistently reporting ANBs were responsible for over 82% of all reported adjudications in year 3 and may provide a more reliable measure.

TIME PERIODS	14 ANBs CONSISTENTLY REPORTING*	% GROWTH
YEAR 1 - May 1998 - April 1999	187	-
YEAR 2 - May 1999 - April 2000	1156	518%
YEAR 3 - May to August 2000	1640	42%

** The Institution of Chemical Engineers has not reported recently and this has reduced the number from the previous of 15 ANBs*

Table 4 – Adjudications by consistently reporting ANBs

Seasonal Effects

In the last report there appeared to be the suggestion of a seasonal trend giving evidence of ambushes in the spring and summer. However when a longer period is reviewed as shown in Figure 1 (September 1999 to April 2001, consistently reporting ANBs only) there is so much

fluctuation in the number of referrals that there is no discernible trend giving support to seasonable ambushes.

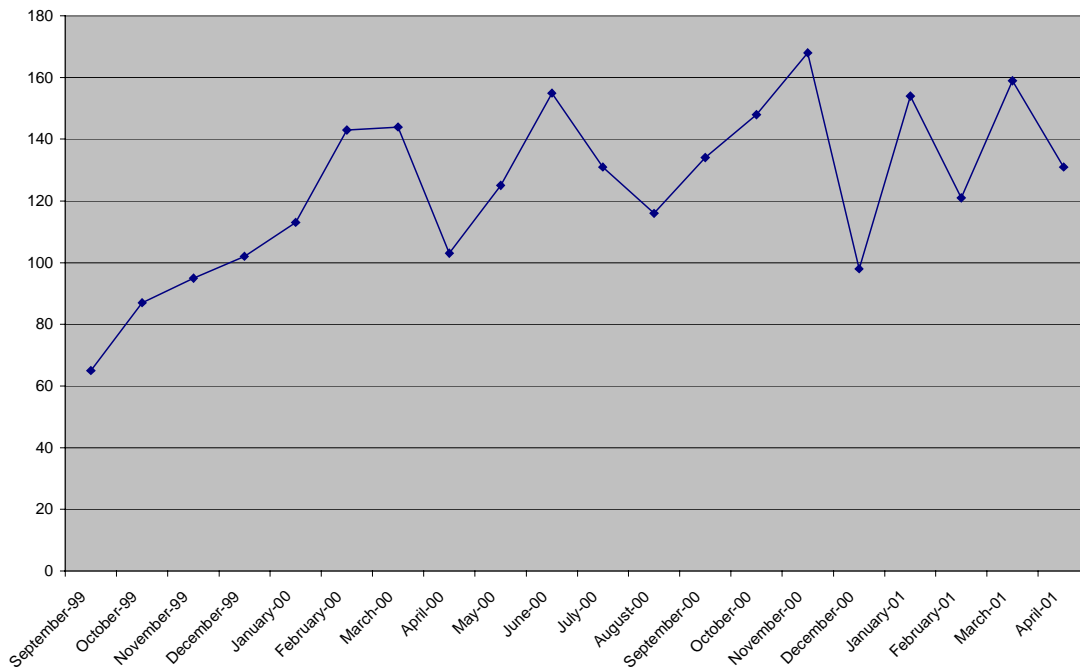


Figure 1 - Monthly referrals to adjudication in the period September 1999 to April 2001

Geographical Distribution

The regional spread of adjudication over the period from March 2000 to April 2001 is shown in Table 3 below: -

AREA	March 2000 to August 2000*	September 2000 to February 2001	March 2001 to April 2001
South England	53.6%	43%	49%
North England	23.1%	21%	17%
Midlands**		15%	14%
Wales	3.1%	1%	1%
Scotland	19.7%	18%	17%
Northern Ireland	0.5%	2%	2%

* Decimal places used to include figure from Northern Ireland

** Midlands added as a category from September 2000

Table 3 - Geographical Distribution of Adjudications

For greater definition the Midlands as an area of England has been included. This has taken away very little from the South England figures. The Midlands figures have been mostly taken from what was previously categorised by the ANBs as North England. It is interesting to note the figures can now be seen to show that Scotland uses adjudication as often as North England. Adjudications are rising in Northern Ireland as might be expected given the later start than the rest of the UK. It will be interesting to see if the size of the construction community has any depressive effect on the uptake of adjudication. The previous report made the point with regard to Scotland

which showed a slow take-up in over the first year but which then saw a more than proportionate adoption of adjudication as a means of resolving disputes.

ANB Fees Levels

ADJUDICATOR NOMINATING BODY	Fee at August 2000 incl VAT	Fee at April 2001 incl VAT
Academy of Construction Adjudicators	235	235
Chartered Institute of Arbitrators	264	264
Confederation of Construction Specialist	not answered	88
Construction Industry Council	176	176
Institution of Chemical Engineers	235	not answered
Institution of Civil Engineers	176	176
Royal Institute of British Architects	176	235
Royal Institution of Chartered Surveyors	275	275
3A's Polycon AIMS Ltd	117	117
Institution of Mechanical Engineers	not answered	not answered
Chartered Institute of Building	235	235
Construction Confederation	176	176
Scottish Building	176	176
Royal Incorporation of Architects in Scotland	176	176
Royal Institution of Chartered Surveyors in Scotland	275	275
Centre for Dispute Resolution	235	282
Institution of Electrical Engineers	not answered	not answered
Technology and Construction Solicitors Association	not answered	not answered
Chartered Institute of Arbitrators (Scottish Branch)	117	117
The Law Society of Scotland	not answered	not answered
Technology and Construction Bar Association	not answered	not answered

Table 4 – Fees charged by Adjudicator Nominating Bodies

Most of the ANBs have kept their fee levels fairly constant over the past year. There appears to be only a very weak relationship between the fee level charged by the ANB and the level of demand for their services. This relationship is indicated in figure 2 below. There are too few data points for any statistical analysis but if a trendline were added it would show an upward gradient to the right. This is counter to a traditional demand curve which would normally show that the lower the price of a product or service, the greater the demand. In this case, generally, the greater the price the greater the demand. The price charged by the ANB is clearly not a factor in their selection as the nominating body.

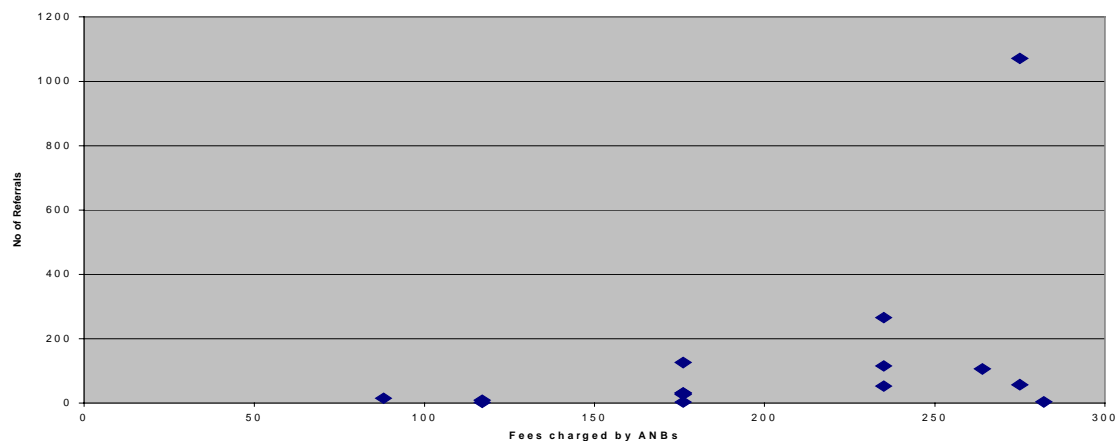


Figure 2 - Relationship between fees charged by ANBs and their number of referrals

Monitoring of Adjudicator's Performance

The number of complaints received by the Adjudicator Nominating Bodies during the period September 2000 to April 2001 amounted to 24. When compared with the total number of adjudications in this period this represents a dissatisfaction rate of 2.16% which is higher than the previous report which indicated a dissatisfaction rate of 1.35%.

Complaints Against Adjudicators	Sept 00 - Feb 01	Mar 00 - Ap 01
Complaints Made	15	9
Complaints Upheld	2	1

Table 5 - Number of complaints against adjudicators

Sept - Feb: - Only one ANB was prepared to discuss these matters in detail. This ANB dealt with 9 complaints, one of which was upheld, 3 other adjudicators were recommended to take action which would avoid further complaints. In the upheld complaint the adjudicator was removed from the panel.

Mar - April 01: - The ANB referred to above dealt with 6 of the complaints. Only one was upheld. This was where the adjudicator insisted on a lien. The ANB indicated that this was not in accordance with HGCR Act and adjudicator resigned.

One of the ANBs has requested CPD forms from all its adjudicators as one of the ways they monitor and keep abreast of their adjudicators' level of knowledge/experience.

Comments from Adjudicator Nominating Bodies

The Adjudicator Nominating Bodies were asked if there was any subject or trend that they had noticed in relation to the adjudication procedures which had not been addressed in the questionnaires. Their responses are summarised below: -

- Institution of Civil Engineers commented that the majority of people using their contract s chose to go to adjudication under the Scheme as they felt that the ICE provisions for notices of dissatisfaction were not compliant with the Act
- ICE reported examples of ambushes in December.
- Chartered Institute of Building reported that jurisdiction and costs remain the usual bone of contention.
- Academy of Construction Adjudicators reported that they had noted a tendency for main contractors to find ways of circumventing adjudications.

FEEDBACK FROM ADJUDICATORS

The first part of this report is largely drawn from the returns from the ANBs and provides valuable and reliable data from which trends may be discerned.

The second part of this research report is to present information (both quantitative and qualitative) collected directly from adjudicators. This report covers the period May 2000 to October 2001. An earlier report (Report No 2 – August 2000) presented data covering adjudicators' experience of the adjudication process up to April 2000. The adjudicators who reported then were asked to complete follow-up questionnaires. Fifty-five adjudicators responded, their experience covering 384 adjudications carried out during the period. The following sets out some of the principal findings.

Where possible comparisons will be made to the findings of Report No 2 to track trends in the patterns of adjudications. In some cases the class intervals have been changed and where this is the case direct comparisons cannot be made.

The Disputing Parties

In answer to the question 'who are the disputing parties?' the results were as shown in Figure 3.

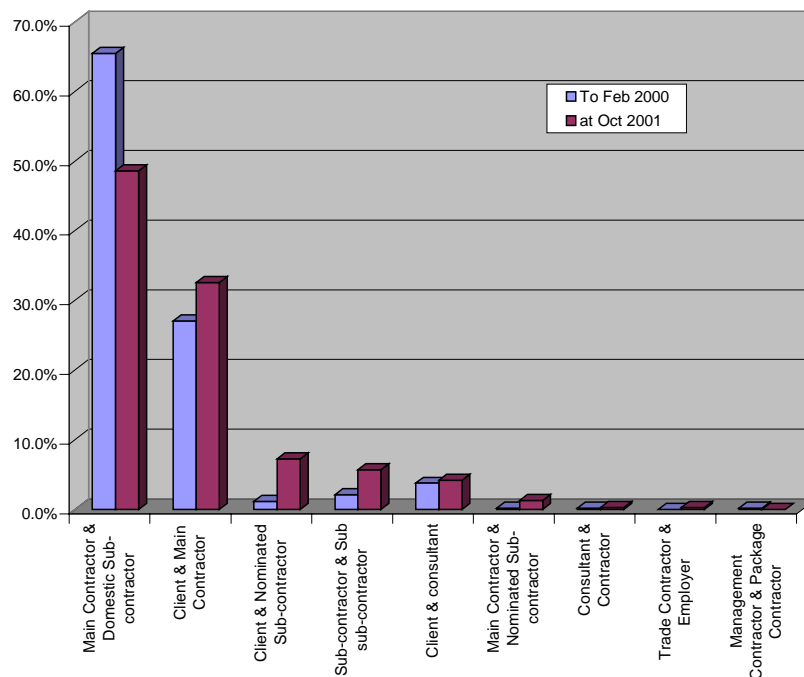


Figure 3 - Parties engaged in adjudications

The results are clear – main contractors and their domestic subcontractors are still the main protagonists, followed by main contractors and their clients. What is particularly interesting here is the changing position regarding the disputing parties. The data shows that, proportionately, the adjudication of disputes between main contractors and their domestic subcontractors are reducing and that adjudication of disputes between all the other important contracting pairs is increasing. Figure 3 shows the closing of what was a huge gap between the number of disputes between main contractor and domestic subcontractor and between client and main contractor. This picture is enhanced by reference to the question about who initiated the proceedings. This information is given in Figure 4.

What this shows is that, proportionately, referrals by domestic subcontractors are falling and referrals by main contractors, clients and sub-subcontractors are rising. This indicates a change in the way in which the process of adjudication is being utilised. The clear intention of the Latham Report and the subsequent 1996 Act was to redress the imbalance of power suffered by domestic subcontractors. It would appear that other contracting parties – initially slow to accept adjudication as a means of resolving disputes (as the extensive case law would suggest) - now see it as a powerful and effective weapon.

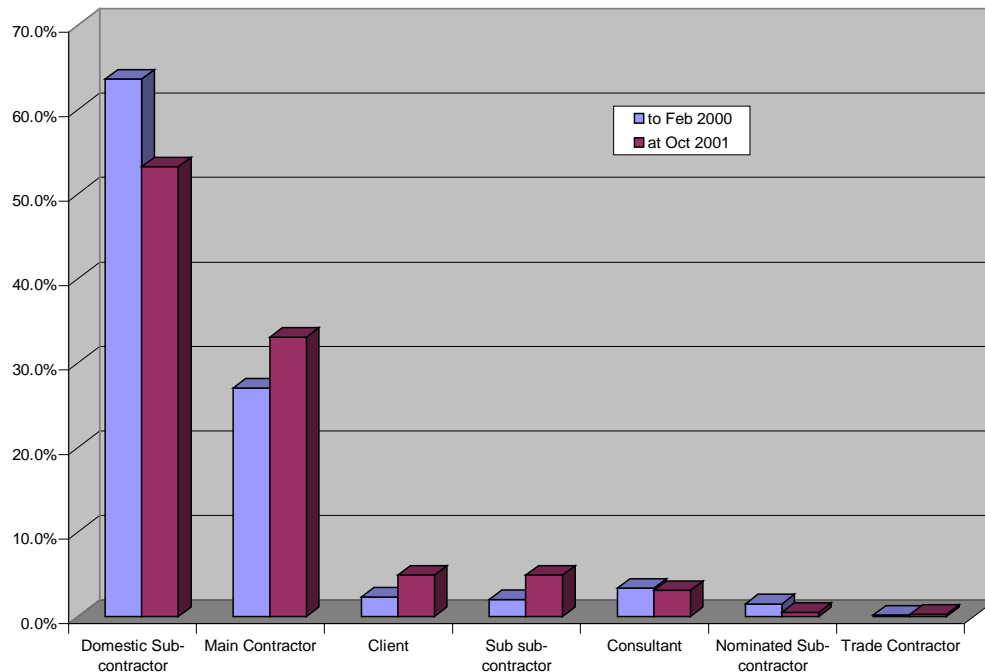


Figure 4 – Parties initiating adjudication proceedings

When Is Adjudication Initiated?

Another interesting observation on the current use of adjudication is when the adjudication is initiated. The intention of Latham was a speedy form of resolution. The context of Latham was of a form of dispute resolution which would allow disputes to be resolved when they arose and allow rapid resolution before relationships suffer – very much in the sense of what the Americans call ‘real-time’ dispute resolution. This belief was evident in the language of the adjudication training courses when statutory adjudication was introduced. Some described the adjudicator as being likened to the referee in a football game who would blow his whistle, stop the game for the shortest possible time, make a decision and let the game proceed without disturbance to the flow of the game. However, as figure 5 shows this is not borne out by the experience of the adjudicators. Figure 5 shows that 67% of adjudications are initiated after Practical Completion.

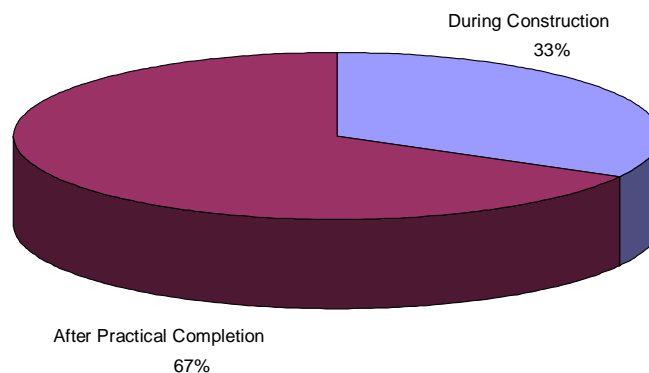


Figure 5 – Timing of Adjudication Referrals

Were the Parties Represented?

The adjudicators reported their impression that more parties were being professionally represented than when statutory adjudication was first introduced and that, at the time of the survey, 63% of the parties were represented by lawyers or dispute resolution consultants, as shown in Figure 6.

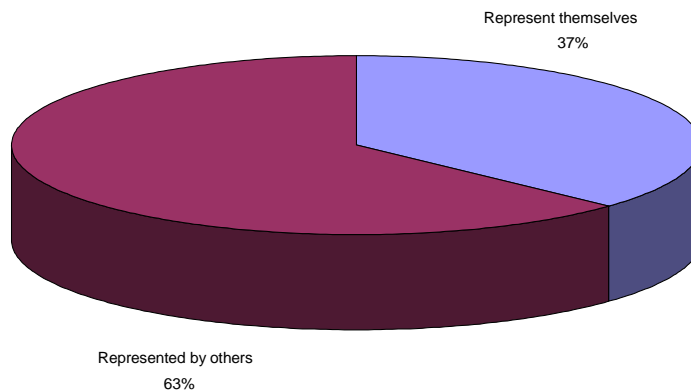


Figure 6 – Representation of parties

Who are the winners and losers?

When asked for whom they found in their adjudications the adjudicators indicated that in 74% of the cases they found for the claimant, 17% for the respondent and in 9% of cases their decision was split (as shown in Figure 7). This is similar to the findings of ARC Report 2 and it would still appear that the one who initiates proceedings is most likely to win.

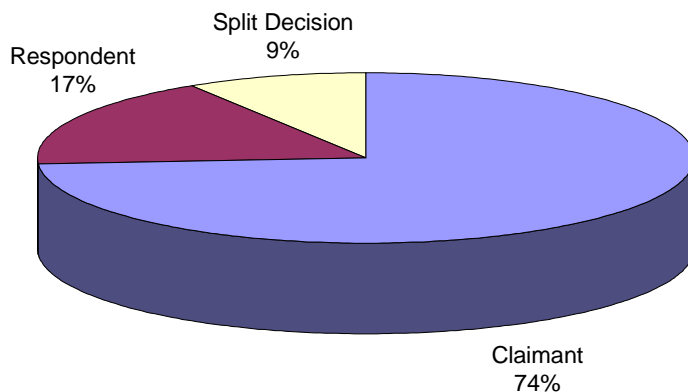


Figure 7 – Successful parties in adjudicators decisions

However it is worth making a comparison between these findings and those of ARC Report 2 in this regard. Figure 8 shows that the number of times the claimant wins has increased and the number of times the respondent wins has increased. This may seem like the ultimate in 'win-win' scenarios but it is the result of a considerable reduction in the number of split decisions. This may be the result of two influences. Firstly the adjudicators have grown in both experience and

confidence and, secondly the increased use of specialist advisors may be helpful in better preparation and improving presentation of the case.

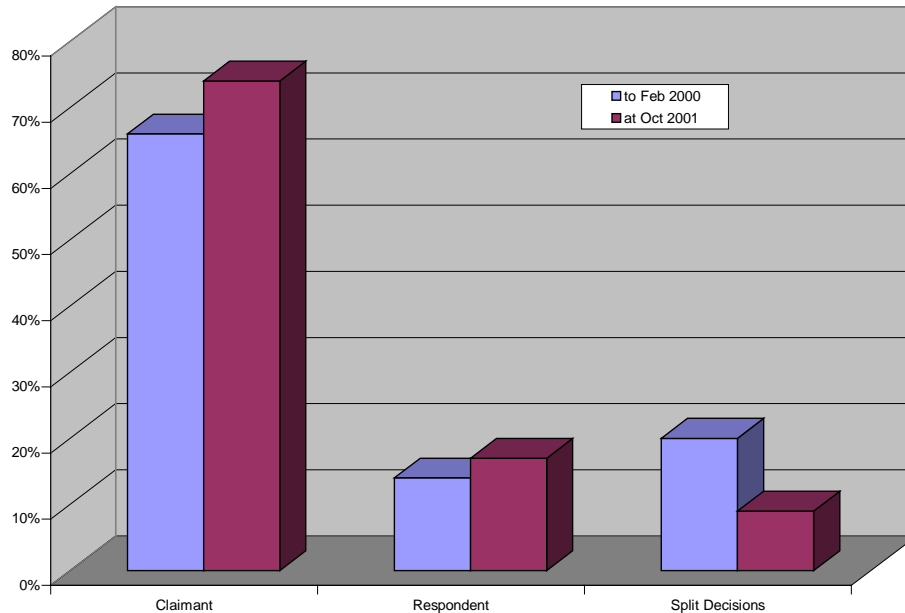


Figure 8 - Comparison of Successful parties in adjudicators decisions

Subjects of the disputes

The subjects of the disputes were found to be as shown in Table 6 and it is clear that the major subject in dispute is still payment. However it is no longer the 'overwhelming' cause of dispute as it was described previously. The adjudicators have reported that main contractors are coming to terms with the provisions of the 1996 Act and have made changes to their payment systems. If the 1996 Act had simply succeeded in meeting this goal of subcontractor payment – which was its prime intention – one would be forgiven for thinking that referrals would now subside. The fact that this has not happened suggests that adjudication is increasingly being used for other issues such as extensions of time and claims for loss and expense. This is reflected in the figures shown below in Table 6.

MAIN SUBJECTS OF THE DISPUTES	%
Failure to comply with Payment Provisions	26%
Valuation of Variations	23%
Valuation of Final Account	17%
Extension of Time	10%
Loss & Expense	10%
Defective Work	4%
Valuation of Works	4%
Determination	3%
Withholding Monies	2%
Non Payment of Fees	1%
Services & Values	1%

Table 6 – Main subjects of disputes between parties

Amounts of Money Involved in Dispute

The amounts of money involved in the adjudications were found to be as Figure 9. This figure shows that the most common disputes involved sums of money between £10,000 and £50,000 but that there were substantial numbers of adjudications dealing with sums of up to £500,000. It is not easy to make comparisons with ARC Report No 2 as the class interval has been changed in this study but it appears to be very similar to the previous study.

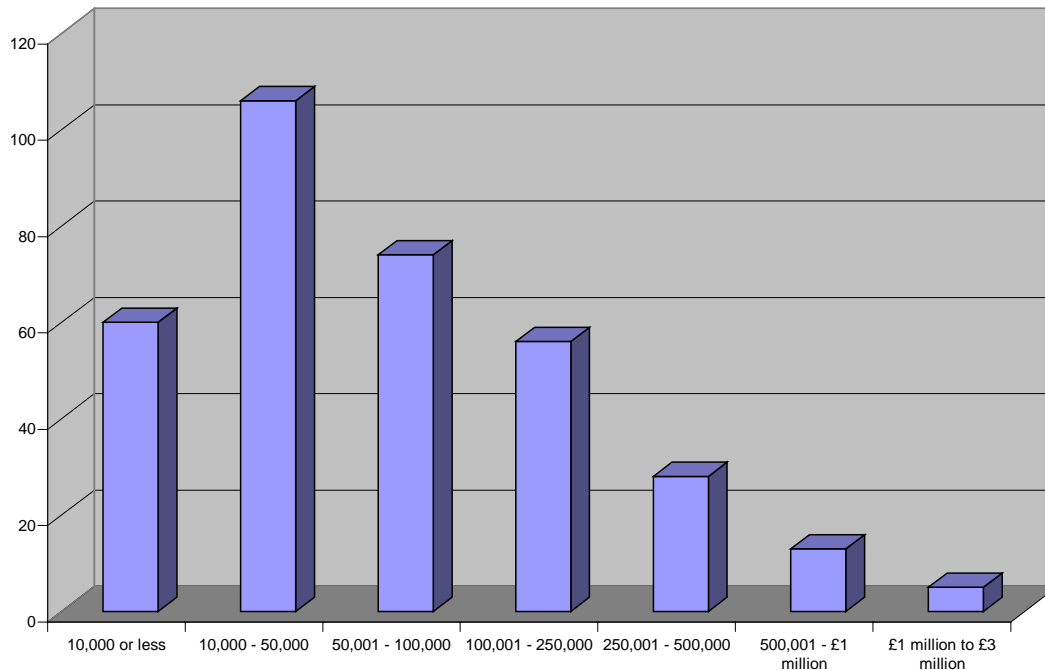


Figure 9 – Number of adjudications in each value group

Adjudications Not Proceeding

In several cases adjudication proceeding were initiated but not completed. The most common reason for adjudications not proceeding is settlement by the parties themselves. The study shows that in about 20% of cases the parties settled themselves. There were a few cases of the adjudications being abandoned. The reasons given for these are shown in Table 7.

Reasons given for abandonment of adjudications: -	No.
Resignation of adjudicator	2
Jurisdictional problems	2
Refusal of Respondent to agree to extension of period for decision	1
Receivership/liquidation of parties	3
Incorrect appointment	2
Referral out of time	2

Table 7 – Reasons for adjudications being abandoned

Lack of Compliance with the 1996 Act

During the study the adjudicators were asked whether the adjudications they had dealt with had shown areas where the provisions of the 1996 Act and the Scheme for Construction Contracts were not being fully put into effect. The principal replies are given in Table 8 and they clearly show that payment provisions are not yet being fully observed and that the Scheme is being relied upon, in most cases by default.

COMPLIANCE WITH THE ACT (& SCHEME)	No of occurrences
How many adjudication decisions have been made using compliant contract Adjudication provisions? (i.e not the Scheme)	121
How many adjudication decisions have been made by defaulting to the procedures of the Scheme for Construction Contracts?	161
How many followed the Scheme because: -	
The conditions of contract made no provisions for payment or adjudication?	85
The Scheme was written into the conditions of contract	9
The conditions of contract made provisions which did not comply with the Act?	20
Of the instances of failure to comply with the payment provisions, how many of these have been due to failure to issue withholding notices	112
How many instances of failure to comply with the payment timescales have been encountered	136

Table 8 – Common instances on non-compliance with the 1996 Act and Scheme

Procedure Adopted by Adjudicators

The adjudicators taking part in the survey were asked to provide some insight into procedural matters. They were asked to state the procedures they had adopted on the adjudications they had carried out during the period of the study.

PROCEDURE ADOPTED BY ADJUDICATORS	%
Adjudicator employed a documents only procedure	56%
Adjudicator employed an interview procedure with only one party present*	3%
Adjudicator employed an interview procedure with both parties present	35%
Adjudicator carried out a full hearings procedure	6%

- One adjudicator noted that this was because the other party failed to attend

Table 9 – Procedures adopted by adjudicators

Table 9 sets out the results of this question and indicates that the most common procedure was a 'documents only' procedure. Site visits were carried out on 44 occasions and in only one case did an adjudicator allow what he called 'controlled examination of certain witnesses and legal debate'.

Compliance with Time Limits

Compliance with a strict timetable is an important feature of the Act and the Scheme. The adjudicators were asked to provide their experience on this important question. Their replies are shown in Table 10 below.

COMPLIANCE WITH TIME LIMITS	%
Decisions given within 28 days	69%
14 day extension of time applied for	27%
Extension of time beyond 42 days applied for	4%

Table 10 – Compliance with Time Limits

This indicates that in 69% of cases a decision was reached within the 28-day period. In the other cases application had to be made for an extension of time. The success rate in applying for extensions of time in the case of a 14-day extension was 72% and in the case of applications for extensions beyond 42 days, the success rate was 91%.

The adjudicators considered that an 'ambush' has taken place on 11% of adjudications.

Cost of the Adjudication Process

The adjudicators are asked to say how much they charged per hour, how long each adjudication takes and how many experts they engage to help them to reach a decision. Figure 10 shows some variation in the fees charged by adjudicators – the most common grouping being £76 to £100 per hour followed by £101 to £125 per hour.

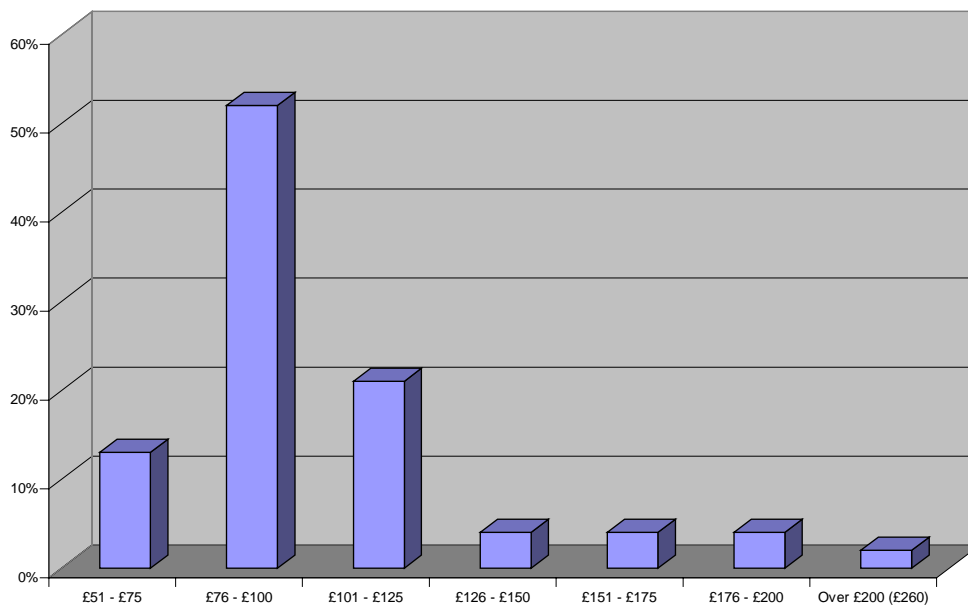


Figure 10 – Hourly fees charged by adjudicators

This is another example of a situation where the class interval has been changed between ARC Report No 2 and this report and this makes precise comparison difficult. It is fair to say however that there has been no significant change in the hourly rates charged by adjudicators.

The question of how long adjudications took to complete was also addressed by the study which found the distribution to be as shown in Figure 11. The numbers taking between 26 and 50 hours were the most common, followed by those taking less than 25 hours. This has changed since the last report, although changes in the class interval do make precise comparison difficult. Previously there were a large number of disputes taking less than 20 hours to reach a decision. This may have been because they were relatively 'open and shut' cases regarding payment which have since declined or it may be that the disputes being referred to adjudication are becoming more complex.

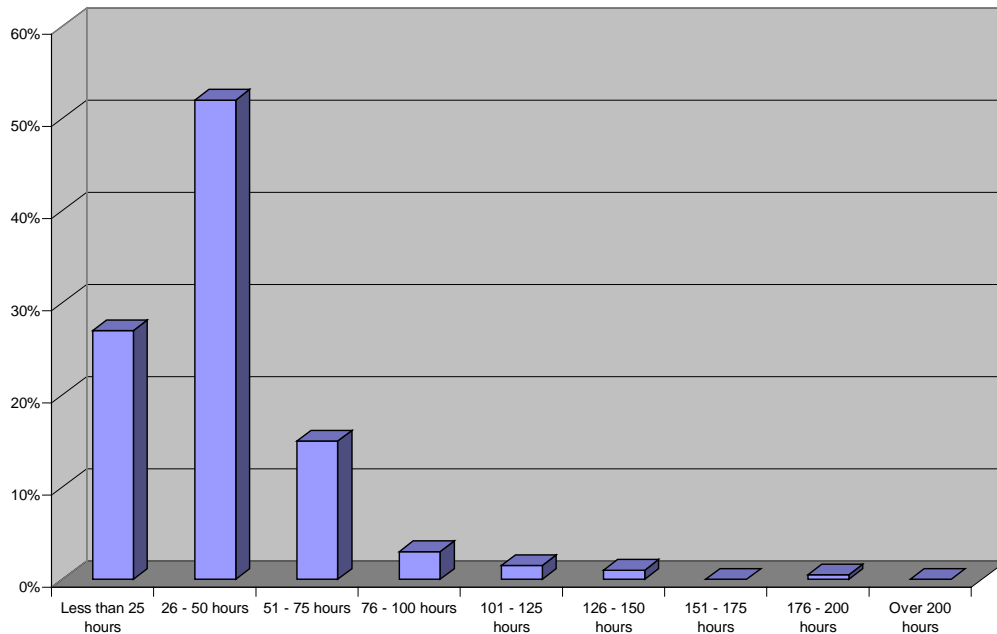


Figure 11 – Hours spent by adjudicators on each adjudication

The number of experts appointed by adjudicators taking part in this study is shown in Table 11. The most common expert advisor was the lawyer (which is the same as the previous report). One interesting change from the last report is in the type of specialist employed. Previously, specialist engineers were used for technical matters whereas in this study it is planning and programming expertise which is required. The number of adjudications in which experts, of all kinds, were appointed was around 8% which, whilst small in number, is double the figure in the previous report.

USE OF EXPERTS	No.
Solicitors	26
Quantity Surveyor	2
Programming & Technical Adviser	2
Delay Analyst	1

Table 11 – Number of experts advisors employed

CONCLUSIONS

The evidence of this study so far is that the adjudication process is being used in significant numbers and that the trend is still upwards although more slowly. The nature of the disputes appears to be changing. We are seeing proportionately less of the simple withholding of payment disputes and an increasing number of disputes regarding extensions of time and claims for loss and expense, which are by their nature much more complex and which may not be suited to the time constraints of the adjudication process. One particularly interesting result of the study is when the adjudications are being initiated – 67% of them after Practical Completion – at a time when arbitration would normally be expected to be the appropriate route. In previous reports it was concluded that quantity surveyors were the people in demand by the adjudication process. It may be, if the trend towards time disputes is confirmed, that there will be an increased demand for those skilled in forensic planning and programming and delay analysis.

The main parties involved in disputes are still the main contractors with their domestic subcontractors but it appears that the main contractors are becoming more attracted to the use of adjudication to resolve disputes with Employers. Employers themselves appear to becoming more willing to pursue their nominated subcontractors and consultants.

As more data emerges there is less clarity about any consistent seasonal effects despite previous suggestions to the contrary.

The authors are indebted to the Adjudicator Nominating Bodies and to the individual adjudicators who have provided a wealth of data to allow an insight into how adjudication is being utilised at present and where it may be going in the future. This is clearly and evolutionary process which requires periodic monitoring.